United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-6127

B-55 #12 5-18-76

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United States Court of Appeals
Second Circuit

Leo A. Popp
Appellant,
- against -
Secretary of Health, Education,
And Welfare,
Appellee

Answer of Appellant to Appellee's Motion to Dismiss Appeal

Docket No. 75-6127

May 3-1976

To: Hon. A. Daniel Fusaro
Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

BRIEF

AND

APPENDIX

James M. Sullivan, Jr.
United States Attorney
Northern District of New York
Attorney for Appellee
U.S. Court House & P.O.
Albany, New York 12207

UNITED STATES COURT OF APPEALS
FILED
JUN 7 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Sirs:

In reply to Appellee's Motion to Dismiss

PAGINATION AS IN ORIGINAL COPY

Appeal - dated April 23-1976 - Docket No- 75-6127, I wish to refer to the following - Rule 30a to f - with special reference to 30 f - Original Record without necessity of Appendix. Also Rule 30. under U.S. Court of Appeals - "18 U S C 3006 A etc" and in all Appeals involving a Social Security decision of Secretary of Health, Education & Welfare". "or in the case of Social Security decisions of the administrative record." Then on pages 88-89 & 90 - under Civil Appeals Management Plan - paragraph 1-10 - I followed this plan and did whatever was requested by the Clerk of the U.S. Court of Appeals - paid docket fee - filed pre argument statement and transcript Information as requested. This was done 11/28/75 - copies to U.S. Attorney were certified (997113) and received Dec 1, 1975 - return post card. Please note paragraph 9 - page 90 of Supplement for use in 1975 on submission of briefs. "When the parties agree to submit the appeal on briefs, they shall promptly notify the Clerk -, who will cause the Appeal to be assigned to the first panel available after the time fixed for the filing of all briefs".

According to assistant Attorney Richard K. Hughes 2 copies of transcript were sent to Hon. A. Daniel Fusaro - Clerk of U.S. Court of Appeals Dec: 30-1975. Therefore it seemed to me that

Assistant U.S. Attorney Richard K. Hughes wished to have the case reviewed by the U.S. Court of Appeals according to Rule 30 f (original record) & Rule 30 of U.S. Court of Appeals - Second Circuit for Social Security Cases and Civil Appeals Managment Plan - pages - 88-89-90 of 1975 - Supplement - this plan is for U.S. Court of Appeals - Second Circuit.

Therefore, in view of the forgoing I ask that the Court review the record and give a decision on the evidence and the facts.

For the convience of anyone who wishes to Review the record easily - I am submitting the items as contained on Pre-argument Statement 11/28/75 - See tr 850 - also ff 36 - Supp - to Index 42 U.S.C for 20 CFR 404.957 c (1) - See Pasqual V Cohen 396 - Supp - 1088 - for use in 1975. In case 73-CV 217 T. 5402 only 2 years, 2 mo, 7 days from 11/5/68 - tr 537 to 11/12/71 tr 672 also 2 years - 10 mo - 19 days from Feb 23, 1968 - tr 523 to Jan 12, 1971 - tr 672 - See tr 509 last pentence - Dec. 14, 1964 & Oct-30-1967 decisions joined together. Therefore no problem to re-open - See 404.957 b - 1, 2, 3 Medical evidence tr 843, 847 + tr 872-876 - See tr 744 + 745 for March 30, 1971 - April 9, 1971 - found on tr 872-876. See Complaint Index 11/21/75 page 1 - also Note of Issue Jan. 7, 1974 "Social Security" Wkly Limitation to April 9, 1970 & Sept 10, 1974 as on ff 445 of Judge Foley Decision pages 445. See page 161 of Index of 11/21/75 and also ff 187 of same Index 11/21/75. We ask for Complete Review of case and decision

based on evidence and facts.

We ask for (1) Benefits computed according to tr 537 - 11/5/68 updated according to evidence especially in tr 834 - 916 (2) $216. deducted from 1971 benefits earnings $661.21 line 13a - tr 849 - #22 - copy + 3 pages submitted with Index page 187 - (3) Benefits for wife on Application Jan 19, 1973 - see tr 39-42 also 35-38 - also stop derogatory & false statements shown tr 819-823 - also 860-864.

Note - under 3 - benefits for wife on Application Jan 19-1973 - see tr 39-42. As of Feb 6-1976 a check for $2594.30 (check # 968-674) to Elizabeth A. Popp was paid. I believe that by going to the Regional Office - Brandon Richards - Director - and Assistant Attorney Nash helped.

We never got a good answer - Why these benefits for my wife were held up for three years in the first place. Just as we can't get answers on the other 3 items. We tried and that is why we ask the Court for help.

If we can supply any other information to anyone we will gladly do so with the hope after all this time justice will be done.

See Black V Richardson D.C. S.C. 1973 - 356 F Supplement 861 - 864 " It used to be easy enough for an Appellate Court to affirm an Administrative Agency on the ground that findings were supported

by substancial evidence if it could find a trace of evidence to support them. But this not true any more - Congress grew critical".

Again, we ask for help from the Court so that justice might be done and a decision and orders based on the evidence and the facts. For details see - Index made by Dist. Court 11/21/75 - page 161 - Answer to Motion for Summary Judgment and Notice of Appeal page 167, of 11/21/75 Index - also copies of misc - papers and records - page 202 of Index made by Dist. Court 11/21/75

Again - if we can give any help to anyone please write.

Leo A. Popp
Appellant.

L.A.P. - eap

Dated - May 3-1976

St. Johnsville, N.Y. 13452
May 3-1976

To Hon. A. Daniel Fusaro
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: Leo A. Popp vs. Secretary of Health, Education & Welfare
U.S. Court of Appeals,
Second Circuit
Docket No - 75 6127

Dear Mr. Fusaro:

Enclosed please find original and 3 copies of answer to Appellee's Motion to Dismiss Appeal.

Please file on behalf of Appellant and return enclosed Carbon Copy of this letter to undersigned with date of filing stamped thereon.

This letter and answer to Motion for Dismissal are sent by certified mail with return post card to Clerk of U.S. Court of Appeals and U.S. Attorney.

cc to U.S. Attorney
James M. Sullivan Jr.

Leo A. Popp
Appellant

L.A.P.:cmp

No.2 5-18-76
75-6127
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UNITED STATES COURT OF APPEALS FILED MAY 18 1976 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

75-6127

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of May, one thousand nine hundred and seventy-six.

Leo A. Popp,

Plaintiff-Appellant,

v.

Secretary of Health, Education and Welfare,

Defendant-Appellee.

It is hereby ordered that the motion made herein by counsel for the

XXXXXXXXX appellee XXXXXXXXX XXXXXXXXX

by notice of motion dated April 23, 1976 to dismiss the appeal from the United States District Court for the Northern District of New York for lack of prosecution

be and it hereby is XXXXXXX denied.

XXXXXXXXXXXXXXXXXXXX

A. Daniel Fusaro
Clerk

By Edward J. Guarino
Senior Deputy Clerk

* * *

Before:

HON. JAMES L. OAKES
U.S.C.J.

HON. ELLSWORTH A. VAN GRAAFEILAND
U.S.C.J.

HON. ORRIN G. JUDD
U.S.D.J. XXXXXXXXXX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LEO A. POPP,

Plaintiff,

-against-

73-CV-217

SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Defendant.

APPEARANCES:

LEO A. POPP
Pro se
R. D. #1
St. Johnsville, New York 13452

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BORGE VARMER
Regional Attorney, Region II
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Office of the General Counsel
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New York, New York 10007

JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION and ORDER

This case is before the court for review, under section 205(g) of the Social Security Act (Act), as amended, 42 U.S.C. §405(g), of a final determination of the Secretary of Health, Education and Welfare (Secretary) which denied plaintiff's fourth application for a period of disability and disability insurance benefits filed pursuant to sections 216(i) and 223, 42 U.S.C. §§416(i), 423, respectively, of the Act.

Prior to submission of this application, plaintiff had filed three other applications seeking to establish his right to a period of disability and disability insurance benefits under the Act. On

August 9, 1963, he filed an application seeking benefits wherein he alleged that he had become unable to work on January 30, 1963, because of arthritis and diabetes. This application was denied initially on February 18, 1964, and after reconsideration on August 11, 1964. Plaintiff then requested a hearing which was subsequently held on November 13, 1964, before Hearing Examiner Maurice C. Rosenzweig. By decision dated December 14, 1964, Hearing Examiner Rosenzweig held that plaintiff was not under a disability as defined in the Act at any time for which his application was effective. On March 17, 1965, the Appeals Council denied plaintiff's request for review of the hearing examiner's decision. Plaintiff instituted no further proceedings in regard to this application.

On July 20, 1966, plaintiff filed his second application for disability benefits. In this application, he alleged that he had become disabled on July 4, 1956, because of arthritis, diabetes, and a possible heart condition. His application was denied initially on August 29, 1966, and again upon reconsideration on February 9, 1967. A hearing was held before Hearing Examiner Rosenzweig and on October 30, 1967, he rendered a decision holding that plaintiff was not under a disability and was therefore not entitled to benefits. After receiving additional evidence, the Appeals Council, by decision dated February 23, 1968, denied plaintiff's request for review of the hearing examiner's decision and held that decision to be correct and final. No appeal was taken from the decision.

Plaintiff filed his third application on October 29, 1968. Once again he alleged that he had become disabled in July 1956 because of arthritis and diabetes. This application was denied initially on January 17, 1969, and upon reconsideration on February 6, 1969. A hearing took place at plaintiff's request before Hearing Examiner Irwin D. Shapiro. His decision, dated April 9, 1970, held (1) that by reason of the Appeals Council's decision of February 23, 1968, it was res judicata that plaintiff was not subject to

any medically determinable physical or mental impairment or combination thereof which met the statutory standard of disability at any time prior to the date of said decision; and (2) that since said date and through April 9, 1970, plaintiff had not incurred impairments which singly or in combination were of such severity as to preclude him from engaging in substantial gainful activity. Plaintiff again requested review of the hearing examiner's decision, which request was denied by the Appeals Council on September 21, 1970. Thus, the hearing examiner's decision stands as the final decision of the Secretary on the third application for disability benefits. No further action was taken with respect to this application.

The fourth and present application was filed by plaintiff on January 12, 1971, alleging an onset of disability as of July 5, 1956, at age 46, due to diabetes mellitus, arteriosclerotic heart disease, osteoarthritis and a lumbar vertebrae fracture. This application was denied initially and again on reconsideration on June 7, 1971 and January 8, 1972, respectively. The case was considered de novo by Administrative Law Judge Charles H. Weintraub who, on December 21, 1972, found that plaintiff was not suffering from a disability within the meaning of the Act. Following the Appeals Council's denial of his request for review of Judge Weintraub's decision, plaintiff retained an attorney who brought this action on his behalf requesting judicial review of the decision. On April 2, 1974, on motion of the defendant, this court remanded the case to the Secretary for the taking of additional evidence regarding plaintiff's earnings record. Upon receipt of such additional evidence and after consideration of the entire record, the Appeals Council rendered a decision, dated September 10, 1974, which found that plaintiff continued to engage in substantial gainful activity during the years 1970 through September 10, 1974, and therefore could not be found to be under a disability as defined in the Act.

On November 4, 1974, plaintiff's attorney withdrew from the case.

Inasmuch as this application was filed more than four years after the date of notice of the initial determinations on both the first and second applications, plaintiff is now barred from attempting to reopen those decisions and, under the doctrine of res judicata, the decisions of the Hearing Examiner finding plaintiff not disabled within the meaning of the Act are binding on this court. 20 C.F.R. §§404.937(a), 404.957(b); Marshall v. Gardner, 298 F. Supp. 542 (S.D.W. Va. 1968), aff'd, 408 F.2d 883 (4th Cir. 1969). Although less than four years elapsed between the determination on the third application and the filing of the present application, the earlier application can be reopened only upon a showing of good cause. 20 C.F.R. §404.957(b). Good cause is deemed to exist if (1) new and material evidence is furnished by the claimant; (2) there is a clerical error in the computation of the benefits; or (3) there is error on the face of the evidence on which the decision was based. 20 C.F.R. §404.958. In the absence of any of those exceptional factors, administrative finality forecloses the reopening or review of adverse decisions which have become final under the regulations. Thompson v. Richardson, 452 F.2d 911, 913 (2d Cir. 1971). The Secretary's decision not to reopen an adverse determination is reviewable by this court only to determine if there has been an abuse of discretion. Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966). Since none of the three exceptional factors required for the reopening of a final decision were present in this case, I do not find that the Secretary abused his discretion in refusing to reopen the decision issued on plaintiff's third application. Consequently, the decisions on all three of the prior applications are res judicata and binding on this court. Domozik v. Cohen, 413 F.2d 5 (3d Cir. 1969).

Therefore, the only issue before this court is whether the Secretary's decision that plaintiff was not disabled within the

meaning of the Act at any time between April 9, 1970 and September 10, 1974, is supported by substantial evidence. If the Secretary's findings of fact are based upon substantial evidence and inferences reasonably drawn therefrom, they are conclusive upon this court and may not be disturbed. 42 U.S.C. §405(g); Gold v. Secretary of HEW, 463 F.2d 38, 41 (2d Cir. 1972); Franklin v. Secretary of HEW, 393 F.2d 640 (2d Cir. 1968).

In order to establish entitlement to a period of disability and disability insurance benefits, plaintiff bears the burden of proving that he was unable to engage in substantial gainful activity by reason of a physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least 12 months and the existence of which is demonstrated by evidence supported by objective data obtained by medically acceptable clinical laboratory techniques at a time when he met the insured status requirements of the Act. 42 U.S.C. 423(d); Gold v. Secretary of HEW, supra. It is not sufficient that plaintiff show he is unable to do his previous work. He must also demonstrate that he cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. §423 (d)(2)(A); 20 C.F.R. §404.1502(b). In the instant case, plaintiff has not even met the initial burden of proving that his impairments prevent him from engaging in his usual employment.

Medical evidence submitted by plaintiff on his fourth application for disability benefits does not differ substantially from that proffered on the three prior applications. A diagnosis made by Dr. Pointon on August 22, 1971, and reaffirmed by him on June 20, 1974, indicates that plaintiff suffers from the following medically determinable impairments: diabetes mellitus, longstanding and moderately controlled; moderately generalized arteriosclerotic heart disease and vascular disease; osteoarthritis; and an old lumbar vertebral fracture with sciatica. Plaintiff also

complains of pain in his lower back and right leg, but Dr. Pointon found plaintiff's overall strength to be good although he exhibited stiffness in his back when in motion and he fatigued easily. Dr. Pointon did not find any of plaintiff's ailments to be severe. He did indicate that in his judgment plaintiff "has made considerable effort to maintain his activity and for a long time should have received additional financial help so that he not subject himself to such fatiguing circumstances as he has: e.g. work on his farm and substitute teaching." Tr. 785, 847. However, a physician's statement that a person is disabled is not controlling for purposes of meeting the disability requirements of the Act, 20 C.F.R. §404.1526, and the Social Security Administration on three previous occasions found that plaintiff's impairments were not disabling. Since plaintiff has not presented any evidence which would demonstrate that the severity of those impairments has increased since April 9, 1970, the Administration's findings are conclusive and are not subject to relitigation in this court. Furthermore, the decision on this fourth application is supported by substantial evidence. Although there is no question that plaintiff is inflicted with diabetes and arthritis, neither of those diseases has been found to be disabling in and of itself. Williams v. Wainwright, 427 F.2d 921 (5th Cir. 1970); Kagan v. Weinberger, 383 F. Supp. 1223, 1225 (D. Kan. 1974). While pain is recognized as a disabling factor for social security benefit purposes, it can constitute a disability only if it is not remediable or is of such a degree as to preclude an individual from engaging in substantial gainful employment. Calpin v. Finch, 316 F. Supp. 17 (W.D. Pa. 1970).

The totality of plaintiff's impairments, particularly when viewed in light of his work record, are not so oppressive that they prevent him from engaging in either his previous occupation as a school teacher or in any other kind of substantial work which exists in the national economy. This is evidenced by the fact that plaintiff has continued to work during the years in which he alleges he was

disabled. During 1970-74, he worked as a substitute teacher, as Supervisor of the Town of Ephratah and of the County of Fulton, and he continued to run his farm with the aid of his family. See 20 C.F.R. §404.1533. Plaintiff's earnings certification and income tax returns contained in the record reveal that he had earnings in every year subsequent to his alleged onset date. In 1970, he earned $2,122.22; in 1971, $2,169.05; in 1972, $1,434.99; and in 1973, $3,437.99. With the exception of 1971, plaintiff's yearly earnings exceeded the $140 per month amount which by law is deemed to demonstrate ability to engage in substantial gainful activity. 20 C.F.R. §404.153(a),(b). Additionally, during those years plaintiff grossed between $5,000 and $9,000 from his truck farm, although the farm actually operated at a loss. Tr. 803, 809. See 20 C.F.R. §§404.1532, 404.1534(a),(e).

It seems that plaintiff's request for disability benefits is predicated not so much on his physical condition as on the fact that he has been unable to obtain full-time employment. See, e.g, Tr. 483. However, the unwillingness of employers to hire the plaintiff is not a factor to be considered in determining his disability. 42 U.S.C. §423(d)(2)(A); 20 C.F.R. §404.1502(b); Whiten v. Finch, 437 F.2d 73 (4th Cir. 1971); Hoffman v. Weinberger, 383 F. Supp. 592, 595 (E.D. Pa. 1974). Furthermore, the fact that plaintiff has been found to be under a disability and entitled to disability retirement benefits by the New York State Teachers Retirement System is not determinative on the question whether he is under a disability for purposes of the Act. 20 C.F.R. §404.1525; Williams v. Weinberger, 373 F. Supp. 1110, 1116 (W.D. Mo. 1974).

Viewing the record as a whole, it is clear that a reasonable mind could very well have reached the same conclusion as did the Secretary -- that plaintiff was not disabled between April 9, 1970 and September 10, 1974, and that he engaged in substantial gainful activity during that time period. Accordingly, the defendant is

entitled to judgment as a matter of law.

That being so, the decision of the Secretary is hereby affirmed; defendant's motion for summary judgment is hereby granted and judgment shall enter in his favor dismissing the complaint.

It is so Ordered.

Dated: August 22, 1975

Albany, New York

James T. Foley

UNITED STATES DISTRICT JUDGE